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RESTRICTIVE BUSINESS PRACTICES INFORMATION

Issue No. 17

This information note is part of a series issued by the UNCTAD secretariat, in response to a request to the Secretary-General of UNCTAD by the Intergovernmental Group of Experts on Restrictive Business Practices, with a view to keeping Governments and other interested bodies or persons informed of recent major developments in the area of restrictive business practices.

I. LEGISLATIVE AND POLICY DEVELOPMENTS IN THE FIELD OF RESTRICTIVE BUSINESS PRACTICES

Amendments to Australian Trade Practices Act

1. On 23 January 1993, 1/ the amendments to the Australian Trade Practices Act which have far-reaching consequences for mergers and acquisition in Australia came into force.

2. Until then, the anti-trust test for mergers and acquisitions was the "dominance" test similar to that applying in the European Community. The new amendments: (a) prohibit mergers and acquisitions that would substantially lessen competition in a relevant market; (b) allow anti-competitive mergers to proceed where the efficiency benefits outweigh the costs; (c) introduce compulsory premerger notification; (d) make enforceable undertakings given by the parties.

3. According to the Act the following factors must be taken into account in determining whether an acquisition is likely to lessen competition in a market: (i) the actual and potential level of import competition in the

market; (ii) barriers to entry; (iii) the level of concentration in the market; (iv) the degree of countervailing power in the market; (v) the likelihood that significant and substantially higher prices or profit margins would result; (vi) the extent to which substitutes are, or are likely to be, available; (vii) the "dynamic characteristics" of the market, including growth, innovation and product differentiation; (viii) the likelihood that a "vigorous and effective" competitor would be removed from the market; and (ix) the nature and extent of vertical integration in the market.

4. The amendments have also dramatically increased financial penalties for the violation of Trade Practices Act, including in relation to mergers. Penalties in relation to corporations increased from AU$ 250,000 to AU$ 10 million, and in relation to individuals from AU$ 50,000 to AU$ 500,000.

Mexico's new competition law

5. In June 1993, in Mexico, 2/ the Federal Competition Act (Ley Federal de Competencia Económica, LFCE) came into force. This Act superseded the Anti-trust Law of 1934 and the Law on Powers of the Federal Executive on Economic Matters, of 1950.

6. The new legislation establishes a policy focused on promoting economic efficiency and protecting the competitive process. It rejects rigid rules used in the past to prohibit behaviour. The LFCE includes two articles of substantive definitions of behaviour. These distinguish two main types of practices:

- Absolute monopolistic practices ("prácticas monopólicas absolutas"), which are activities usually labelled as horizontal agreements, such as cartels and price fixing agreements.

- Relative monopolistic practices ("prácticas monopólicas relativas"), which are activities usually labelled as vertical or exclusionary practices.

7. The new legislation makes a substantially preventive view with regard to mergers and acquisitions. Only large mergers have to be pre-notified to the Federal Competition Commission (Comisión Federal de Competencia, CFC). The Act establishes that operations are not to be evaluated only by their size. Whether a firm that competes in the international market is big or small does not depend on its relationship to the national market, but upon international market where it operates. Because of this, the new legislation rejects the idea that big firms are by themselves a monopoly, or conversely, that is necessary to permit national monopolies in order to be internationally competitive.

8. The new legislation states that a merger or acquisition will not be prohibited or reverted, or divestiture be ordered, because of the mere presumption that it becomes a monopoly in the future. The operation will have to be analysed at the time it took place, and not in relation to the prevailing state of affairs at the time of evaluation. Divestiture is a possible outcome of decisions by the CFC, but only for corporations that incur in illegal activities, and divestiture cannot be imposed as a preventive tool.

9. Surveillance and enforcement of the Act are the responsibility of the Federal Competition Commission (Comisión Federal de Competencia, CFC), which has independent functions and operations with respect to other agencies including the Ministry of Commerce and Industrial Promotion.

10. The Commission has the power to investigate and penalize anti-competitive practices; to issue opinions on programmes and policies of the Federal Public Administration, when these may obstruct the competitive process; to issue opinions upon request by the Federal Executive, on presidential bills with respect to questions pertaining to competition and to issue non-binding opinions on legislation, agreements and administrative actions, with respect to their effect on the competitive process. The CFC is composed of five commissioners, appointed for a 10-year period by the President of the Republic and an Executive Secretary, appointed by the President of the Commission.

New Swedish Competition Act

11. On 14 January 1993, 3/ the new Swedish Competition Act was promulgated. This Act which came into force on 1 July 1993 is based on the principle of prohibition and supersedes the previous Act which was based on the principle of abuse control.

12. The new Act, which is modelled after articles 85 and 86 of the Treaty of Rome, prohibits: (a) anti-competitive cooperation; and (b) abuse of a dominant position.

13. The prohibition against anti-competitive cooperation applies only where the cooperation has an appreciable effect on the Swedish market. Cooperation between small enterprises often falls outside the scope of this prohibition. In principle, small enterprises are not subject to the prohibition against anti-competitive cooperation if their market share is less than about 10 per cent. If their annual turnover is less than 10 million SEK the market share may be somewhat larger.

14. Enterprises may apply for individual exemptions from the prohibition on anti-competitive cooperation, which will be granted by the Competition Authority. As a general rule, the Competition Authority has a maximum of three months to make a decision in this regard. An important number of agreements which are eligible for exemptions will be covered by block exemptions. The Swedish competition rules provide block exemptions for agreements on specialization; research and development; exclusive distribution; exclusive purchasing; motor vehicle distribution and servicing; patent licensing; know-how licensing and franchising. These block exemptions are based on those in force in the European Community. Swedish competition rules also provide block exemption for certain types of cooperation in chains in the retail trade. This will primarily apply to cooperation that has favourable effects by making it possible for small undertakings to compete effectively with larger ones.

15. The Competition Authority may order an undertaking to terminate infringement of a prohibition under penalty of a fine.

16. The Stockholm City Court may, at the request of the Competition Authority, order an undertaking to pay a special anti-competitive behaviour charge as a means of effectively deterring undertakings from infringing prohibitions. The maximum sanction will be 5 million SEK or an amount that may be higher but must not exceed 10 per cent of annual turnover.

17. The new Competition Act contains rules laying down civil law penalties designed to deter undertakings from infringing the prohibitions. Agreements subject to prohibition against anti-competitive behaviour will be void. An undertaking may also be ordered to pay compensation to an aggrieved party if it infringes the prohibition against anti-competitive cooperation or abuse of a dominant position.

18. The new Competition Act also contains provisions regarding merger control. Where the parties to a merger have an aggregate turnover in excess of 4 billion SEK, the merger must be notified to the Competition Authority. Steps to prevent the merger may be taken if it is liable to have a significant adverse effect in the long term.

19. Undertakings must supply the Competition Authority with the necessary material and documents to enable it to carry out its investigations. The Authority may also require municipalities and county councils to supply information concerning costs and revenues. The Competition Authority will be authorized, following a decision by the Stockholm City Court, to carry out investigations on the premises of undertakings and, where necessary, to receive assistance from the enforcement service.

20. The judicial process will take place at two judicial levels, including specialized courts. The Stockholm City Court will be the court of first instance for cases relating to anti-competitive behaviour charges and mergers. Appeals against decisions by the Competitive Authority on exemptions, negative clearance and the imposition of fines may be lodged with the Stockholm City Court. Appeals against decisions of this court may be lodged with the Market Court, which will be the final court of appeal.

Polish Act on combating unfair competition

21. In April 1993, 4/ in Poland, the Act for Combating Unfair Competition was enacted by the parliament. This text which had to be signed by the President of the Republic is devised for preventing and combating unfair competition in economic activities, in the interest of the public, entrepreneurs, customers and particularly consumers.

22. In the text the most serious and most common infringements of the law as well as rules of fairness in trading, including advertising, are listed as follows: (i) identifying an enterprise product or service in a misleading way; (ii) infringing a trade secret; (iii) inducing a party to dissolve or not to complete a contract; (iv) imitating products; (v) impending access to a market; and (vi) slandering and baseless praising, as well as dishonest or prohibited advertising.

Canada/EC talks on a possible competition policy agreement

23. During 1992, 5/ Canadian and European Commission officials held extensive talks toward the formulation of a bilateral competition policy agreement. The negotiations aimed to build on the parties' respective experience with bilateral anti-trust arrangements under the 1984 Canada/United States Memorandum of Understanding and the 1991 EC/United States Competition Law Agreement.

24. In December 1992, European Commission Vice-President, Sir Leon Brittan, announced that the discussions between Canada and the EC were at an advanced stage and that the draft text under consideration had adopted many of the principles contained in the EC/United States Agreement, as well as a number of improvements.

25. As it appears, the conclusion of these negotiations may have been delayed by the outstanding European Court of Justice proceeding initiated by the French Government, which challenged the European Commission's competence to conclude the EC/United States Agreement. In this respect, France has alleged that many of the matters covered by that Agreement are beyond jurisdiction of the Commission.

26. It is recalled that the EC/United States agreement on cooperation in the area of competition policy, which was concluded in September 1991, 6/ aims at promoting cooperation and coordination between competition authorities of the United States and the European Commission, in order to lessen the possibility or impact of differences between the parties in the application of their competition laws. Under the terms of the agreement, each party is requested to notify the other when it becomes aware that its enforcement activities may affect important interests of the other party. Such enforcement will include action against anti-competitive practices and the vetting of mergers and acquisitions. The parties agree to share information in order to help in the application of their respective competition laws, and to promote better understanding of economic conditions relevant to their enforcement decisions. Officials are expected to meet at least twice a year to exchange information and to discuss potential policy changes and other matters of mutual interest. Ad hoc consultations on cases can also be undertaken. The provision which concerns the issue of coordination of enforcement activities is sufficiently flexible to allow parties to coordinate their actions by one party assuming the lead responsibility for a specific enforcement activity of common interest to both parties. If one of the parties believes anti-competitive behaviour on the other's territory threatens its own interests, for example by denying companies the chance to compete properly, it may request the other party's competition authorities to initiate enforcement activities. Each party is obligated, to the extent compatible with it own laws and its more important interests, to seek to take into account the important interests of the other party at all stages in its enforcement activities. Confidentiality of information is fully respected under the agreement, which does not require either party to submit information where such disclosure is prohibited by its own laws or is incompatible with its own interests. The agreement entered into force immediately, and is subject to review within two years in order to identify additional areas where cooperation might be beneficial to both parties.

II. DEVELOPMENTS IN THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

A. Restrictive business practices in goods and services

Microsoft investigated for anti-trust violations

27. On 20 August 1993, 7/ it was announced that the United States Justice Department is pursuing an anti-trust investigation of Microsoft, the world's largest personal computer software company.

28. Justice officials had initiated an inquiry after a preliminary review of evidence gathered by the Federal Trade Commission (FTC) in its three-year anti-trust probe of the company.

29. On two occasions, first in February and then in July 1993, the FTC staff recommendation for anti-trust action against Microsoft failed to win a majority vote from the four commissioners considering the case. Two of the Commissioners had not been convinced. Then the FTC announced that it had voted to close its investigation of Microsoft. FTC warned that the Commission's decision should "not be construed as a determination that a violation may not have occurred".

30. The FTC decided to probe the software industry in June 1990 following reports about Microsoft's dominance in the personal computer operating system market. Microsoft's competitors had complained that the company uses anti-competitive practices to achieve its dominant role in the market. Microsoft is the leading supplier of software for PCs. Its MS-DOS programme which controls the basic functions of a computer, is used on an estimated 95 per cent of all standard PCs (excluding the Apple Macintosh). This has given the company a virtual monopoly in the industry. Microsoft's competitors claim that Microsoft has constrained competition in the market for PC operating systems through its use of "per processor" licensing policies. Microsoft offers discount to computer manufacturers which agree to pay licence fees for the use of MS-DOS, calculated on the total number of PCs they sell, rather than the number of copies of the programme they make. According to the Novell, one of the competitors, this prevents PC makers from offering their customers alternative operating systems such as Novell's DR-DOS. If a customer chose DR-DOS, for example, the PC maker would still have to pay Microsoft's MS-DOS licensing fee because of the "per processor" licensing agreement. Microsoft has also been accused of "technological tying" by allegedly introducing features into some of its programmes which link their use to other Microsoft products. A further charge is that the company gives its own applications programme developers who develop word processors, spreadsheets or games, information about operating system programme changes before it informs competitors, thereby putting the latter at a disadvantage.

31. Microsoft has consistently denied any wrongdoing and said that these are simply whining and complaints from companies which envy Microsoft's success or are not as clever or competitive. Its executives reject any suggestion that that company might need to modify its practices.

32. The Justice Department's involvement represents a more serious threat to Microsoft than it faced from FTC. The FTC had narrowed its case against

Microsoft to issues unlikely to have a significant financial impact on the company. But the Justice Department is expected to broaden the case, raising the possibility of tougher sanctions.

33. The Microsoft's alleged anti-trust violations are also being investigated by EC competition authorities. The EC investigation stems from a complaint filed on 30 June 1993 by Novell Computer Networking Software Company.

EC may move to break open airport ground-handling monopolies

34. On 25 August 1993, 8/ the European Commission's Competition Commissioner announced that EC is ready to move against monopolies in airport ground-handling services.

35. He said a special directive aimed at deregulating services such as passenger check-in, baggage handling and refuelling would be the "best general solution" to the problem of monopolies at some EC airports. He added that he would be prepared to use controversial powers under article 90 of the Treaty of Rome, which provide for imposed liberalization. This may be needed as in some cases Governments have been responsible for granting special or exclusive rights to companies providing ground services.

36. A group of seven airlines led by Dutch flag carrier KLM have lodged complaints about ground services at Milan, Madrid and Frankfurt airports. These submissions allege that charges at the airports are between 30 per cent and 50 per cent higher than at airports where competition is permitted. Some carriers claim that ground service costs could fall by 20 per cent or more if article 90 is used.

37. The EC Commissioner said that work on a draft directive on airport ground services is already under way. This could be endorsed, via the usual procedure of approval by member States, or imposed through article 90.

38. Some monopoly airports claim safety will be compromised if too many rival companies are allowed to compete for ground-handling contracts.

Anti-trust cases against multinational pharmaceutical companies in Brazil

39. In April 1992, 9/ the Brazilian Administrative Anti-trust Court opened seven cases against multinational pharmaceutical companies under Brazil's new anti-trust law.

40. The actions were the first to be filed under Law 8158 in effect since 8 January 1991. The multinational pharmaceutical companies were accused of withholding medicines from the market to pressure the Government into lifting price controls. According to the President of the Administrative Anti-trust Court (CADE), if the Government can show that the companies worked in concert to effect a market shortage, it may also charge them with cartel activities under Law 8158.

41. The maximum penalty provided under the Law is expropriation of the company. Criminal penalties of up to two years' to five years' imprisonment

may be imposed for crimes of abuse of economic power under article 4 of Law 8137 of 27 December 1990. Such criminal sanctions only may be handed down by a court, not an administrative tribunal like CADE.

42. In May 1992, between 50 and 60 other complaints were being investigated by SNDE (the anti-trust investigatory unit created by Law 8158) in a number of industries - including tyres, electronic goods, and bicycles. Most of the inquiries stemmed from private complaints, but in many cases the investigations were initiated directly by SNDE.

Eight United States airlines charged with price fixing

43. On 21 December 1992, 10/ the United States Department of Justice filed a civil complaint in the District Court for the District of Columbia charging eight United States airlines and the Airline Tariff Publishing Company (ATP) with price fixing. ATP, which is owned by a group of airlines which includes the defendant airlines, is an airline fare data collection and dissemination service. In addition to the price-fixing charges, the Department's complaint alleged that the defendant airlines operated ATP in a manner that unreasonably restrained price competition in the $40 billion United States domestic air passenger transportation industry. The complaint outlined a practice whereby, using ATP, the airlines were able to engage in an elaborate dialogue with one another about future fares. Typically, the dialogue took the form of repeated exchanges through ATP of price increase proposals and counter-proposals, allegedly resulting in agreement on future fares or the elimination of fares discounts. At the same time the complaint was filed, the Department filed a proposed consent decree that would settle the suit against two of the defendant airlines, United Airlines and United States Air. Those airlines agreed to refrain from using the features of ATP that allegedly allow competing airlines to reach agreement on price or to unreasonably restrain price competition.

United States Supreme Court decision on title insurance rate-setting arrangements

44. In the case of Federal Trade Commission vs. Ticor Title Insurance Co., 112S.CT.2169 (1992), 11/ the United States Supreme Court refused to extend anti-trust immunity to title insurance rate-setting arrangements by state governments, because the States did not actively supervise those arrangements.

45. The Court's opinion was expressed in a review of an FTC decision holding that collective rate-setting activities of title insurance companies for title search and title examination services constitute an unfair method of competition (price-fixing). The companies contended that their conduct is protected by the "state action" doctrine and is also immune from Federal anti-trust challenge because it is "the business of insurance". The "state action" doctrine, first articulated in Parker vs. Brown, 317 US 241 (1943), recognized that certain private conduct, when performed pursuant to a programme or policy established by a state government, will be immunized from anti-trust liability. In October 1991, the Supreme Court granted certiorari to review a February 1991 decision of the United States Court of Appeals for the Third Circuit, which held that the companies' conduct was protected by the "state action" doctrine. On 15 June 1992, the Court entered an order

reversing the decision of the Court of Appeals, holding that the Commission had properly rejected the "state action" defence with respect to the states of Montana and Wisconsin. The Court re-affirmed the rule that, in order to grant immunity to private conduct the state must have articulated a clear policy favouring such anticompetitive conduct and must have actively supervised the conduct in question. The Court remanded the case to the Court of Appeals for further proceedings.

JFTC annual report on inquiries on Competition Law

46. In July 1993, 12/ the Japan Fair Trade Commission (JFTC) reported a reduction in the number of inquiries on competition law to the agency during the most recent fiscal year. This decrease was attributed to the agency's active educational efforts in the business community and increasing public awareness about fair trade.

47. The JFTC annual report on inquiries, released on 6 July 1993, indicated that the agency received a total of 808 inquiries from business associations and organizations in fiscal year 1992 (which ended on 31 March 1993), compared to 960 inquiries in fiscal year 1991 and 845 inquiries in fiscal year 1990.

48. Of the 808 cases, large corporations accounted for 9 per cent, up from 6 per cent in FY 1991 and 4 per cent in FY 1990. Small and medium-size corporations accounted for 60 per cent down from 70 per cent in FY 1991 and 69 per cent in FY 1990.

49. By industry, manufacturers accounted for 30 per cent of the total inquiries in FY 1992, unchanged from FY 1991 and up from 27 per cent in FY 1990; wholesalers represented 11 per cent, down from 13 per cent in FY 1991 and FY 1990, respectively; retailers represented 16 per cent, down from 19 per cent in FY 1991 and FY 1990; services accounted for 23 per cent, up from 21 per cent in FY 1991 and unchanged from 23 per cent in FY 1990; and transport, construction, and others represented 20 per cent, up from 17 per cent in FY 1991 and 18 per cent in FY 1990.

50. By type, inquiries about organization members' pricing accounted for 38 per cent of the total, up from 28 per cent in FY 1991 and down from 39 per cent in FY 1990; inquiries other than pricing represented 32 per cent, up from 31 per cent in FY 1991 and 24 per cent in FY 1990; inquiries as to organizations in general accounted for 22 per cent, down from 24 per cent in FY 1991 but up from 20 per cent in FY 1990; and those on legal interpretation represented 8 per cent, down from 17 per cent in both prior fiscal years.

51. The JFTC has been releasing the annual inquiry report since 1982.

B. Acquisition of market power through mergers, takeovers and joint ventures

Merger activities in the United Kingdom

52. In 1992, in the United Kingdom, 13/ the Office of Fair Trading (OFT) considered 200 mergers and merger proposals under the terms of the Fair Trading Act 1973. This represented a 30 per cent reduction on the total for 1991, when 285 were considered.

53. To qualify for examination a merger must involve the acquisition of gross (fixed and current) assets of £30 million or more, or lead to the creation or enhancement of a market share of 25 per cent or more. Sixty-seven cases were found to be merger situations which did not satisfy the assets or market-share criteria specified by the FTA and did not, therefore, qualify for investigation. The Director-General of Fair Trading (DGFT) advised the Secretary of State for Trade and Industry on 125 qualifying mergers or merger proposals. This total includes 21 requests for confidential guidance, of which 19 received favourable guidance and one unfavourable. No guidance was given in the remaining case because the OFT felt that there was not enough information on which to offer a considered view of the likelihood of a reference should the merger go ahead.

54. The total value of the assets of the target enterprises involved in the 125 qualifying merger situations examined by the OFT in 1992 was £83 billion.

55. At the end of the year 1992, 40 further mergers or merger proposals were still under consideration.

Merger Control in Germany

56. On 5 August 1993, 14/ on the occasion of the twentieth anniversary of merger control in Germany, the Federal Cartel Office announced that from the enactment of merger control in Germany in 1973, until the end of June 1993, the FCO reviewed a total of 16,780 merger cases. Out of these, 102 mergers were prohibited. In many other critical cases the competitive concerns expressed by the FCO were taken into account and merger proposals were abandoned or modified. A ministerial authorization of a merger for overall economic reasons following a prohibition decision by the FCO was applied for in 15 cases but granted in only 6 cases.

Notes

1/ Anti-trust and Trade Regulation Report, Vol. 63, 9 July 1992. See also Canadian Competition Record, Vol. 14, No. 1, p. 21, March 1993.

2/ Information transmitted by the Government of Mexico.

3/ Information transmitted by the Government of Sweden.

4/ Information transmitted by the Government of Poland.

5/ Canadian Competition Record, Vol. 14, No. 2, June 1993, p. 14.

6/ See Europe, No. 55, of 25 September 1991.

7/ Financial Times of 19 and 23 July 1993.

8/ Anti-trust and Trade Regulation Report, Vol. 65, No. 1630, 2 September 1993.

9/ Anti-trust and Trade Regulation Report, Vol. 62, No. 1564, 7 May 1992.

10/ Information transmitted by the Government of the United States of America.

11/ Information transmitted by the Government of the United States of America.

12/ Anti-trust and Trade Regulation Report, Vol. 65, No. 1623, July 1993.

13/ Information transmitted by the Government of the United Kingdom.

14/ Federal Cartel Office, press release No. 6193, 3 August 1993.